CASE NOTES

Gender-critical beliefs - Philosophical belief within the meaning of s. 10 Equality Act 2010 - Articles 9, 10 and 17 ECHR

Forstater v CGD Europe and Others (2021) UKEAT/0105/20/JOJ, [2021] 6 WLUK 104

Employment Appeal Tribunal

Facts

The Claimant, Maya Forstater, holds gender-critical beliefs, which include the belief that sex is immutable and not to be conflated with 'gender identity'. She had participated in debates on Twitter about the proposals made by the House of Commons Women and Equalities Committee's Report on 'Transgender Equality' in 2016 to amend the Gender Recognition Act 2004 to remove all its current assessment processes for obtaining a Gender Recognition Certificate, and enable people to change their legal gender by a process of self-declaration. Following this report there was a public consultation about these proposals, which led to considerable public debate. In late 2018, the Claimant had commented on Twitter about the potential impact on women and girls of the proposals for gender self-declaration and had sent tweets, which essentially stated that men could not actually become women.

As a result of sharing her gender-critical beliefs on Twitter, the Claimant's employment as a senior researcher at the Centre for Global Development (CGD), a think tank based in London and Washington, was terminated. She brought a discrimination claim before the Employment Tribunal, arguing that her gender critical beliefs are a philosophical belief and should be protected as such under s.10 of the Equality Act 2010. She also argued that her lack of belief in an inner 'gender' should be protected. In November 2019, there was a preliminary hearing to determine whether her beliefs were a protected philosophical belief within the meaning of section 10.

In order to be protected under s.10, a belief must satisfy five criteria established in *Grainger plc v Nicholson* ([2010] I.C.R 360), which are known as the "Grainger criteria''. The fifth criteria ("Grainger V'') is that the belief must be "worthy of respect in a democratic society and not be incompatible with human dignity and not conflict with the fundamental rights of others''. The Employment Tribunal (ET) found that that the Claimant's beliefs did not meet this criterion because they were "absolutist'' in nature; and because the Claimant would "refer to a person by the sex she considers appropriate even if it violated their dignity and/or creates an intimidating, hostile, degrading or offensive environment''. The ET reached this conclusion because the Claimant had stated that, while she would use preferred pronouns a matter of courtesy, she reserved the right not to do so in some circumstances. The Claimant appealed the ET's decision. The Equality and Human Rights Commission and the non-governmental organisation Index on Censorship, which monitors freedom of expression in the UK, were intervenors in the appeal. Both organisations sought to question the ET's judgment.

The decision of the Employment Appeal Tribunal

The Employment Appeal Tribunal noted the ET's findings as to the Claimant's belief:

> 77. The core of the Claimant's belief is that sex is biologically immutable. There are only two sexes, male and female. She considers this is a material reality. Men are adult males. Women are adult females. There is no possibility of any sex in between male and female: or that a person is neither male nor female. It is impossible to change sex. Males are people

> with the type of body which, if all things are working, are able to produce male gametes (sperm). Females have the type of body which, if all things are working, is able to produce female gametes (ova), and gestate a pregnancy. It is sex that is fundamentally important rather than "gender'' "gender identity'' or "gender expression''. She will not accept in any circumstances that a trans woman is in reality a woman or that a trans man is a man. That is the belief that the Claimant holds.'

The Appeal Tribunal referred to this belief as the Claimant's ''gender-critical belief''. It found that this belief was protected under s.10 of the Equality Act 2010 and upheld the Claimant's appeal. The sole issue in the appeal was whether the ET had erred in law in reaching the conclusion that the Claimant's gender-critical beliefs did not satisfy the criterion in Grainger V, and therefore were not a philosophical belief within the meaning of s.10. The case will now return to the Employment Tribunal for a determination of the substantive issues in Forstater's discrimination claim.

The Appeal Tribunal found that the ET had erred in its application of Grainger V, and held that a philosophical belief would only be excluded for failing to satisfy Grainger V if it was a belief akin to Nazism or totalitarianism, and therefore liable to be excluded from the protection of rights under Articles 9 and 10 of the European Convention on Human Rights 1950 by virtue of Article 17 of that Convention. Accepting the Claimant's submission that Article 17 is the appropriate standard against which Grainger V should be assessed, it found that the Claimant's gender-critical beliefs clearly did not fall into the category of beliefs which would be excluded from protection by Article 17. Noting that these beliefs were widely shared and did not seek to destroy the rights of trans persons, it found that the Claimant's beliefs fell within the protection of Article 9(1) and therefore within s.10, notwithstanding that they were offensive to some people and could in some circumstances potentially result in the harassment of trans person.

The Appeal Tribunal noted that it was appropriate to consider the effects of Article 9 and 10 ECHR in its analysis of s.10. It stated that the approach to be taken should be to consider the case law in relation to the most applicable right, interpreted where appropriate in the light of the other, as set out in *Ibragimov v Russia* ((2019) 1413/08 & 2862/11 [78]). It was not in dispute that the most directly applicable right in this case was the Article 9 right to freedom of belief. The Appeal Tribunal further noted that the paramount guiding principle in assessing any belief is that it is not for the Court to inquire into its 'validity' by some objective standard. The freedom to hold whatever belief one likes requires the State to remain neutral as between competing beliefs, refraining from expressing any judgment as to whether a particular belief is more acceptable than another, and to try to ensure that groups who hold opposing beliefs tolerate each other (*Metropolitan Church of Bessarabia v Moldova* 92002 35 EHRR 13, paras 1125 and 116).

In order to be protected under Article 9, a belief need only satisfy very limited threshold requirements, and the bar should not be set too high (*Harron v Chief Constable of Dorset Police* [2016] IRLR 481 (EAT) [34]*, Gray v Mulberry* [2020] I.C.R. 715 [27]). The Appeal Tribunal noted that Grainger V was derived from passages in two earlier decisions: *Campbell and Cosans v United Kingdom* 4 EHRR 293, and *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15.

In *Campbell and Cosans,* the European Court of Human Rights had regard to the Convention as a whole, including Article 17, in deciding that the applicant's views on corporal punishment in schools did amount to a philosophical conviction. Article 17 prohibits the use of the ECHR to destroy the rights of others, and the Appeal Tribunal noted that Article 17 would prevent reliance on the right to freedom of expression to espouse hatred, violence or a totalitarian ideology that is wholly incompatible with the principles of democracy. It stated that the fundamental freedoms and rights conferred by the Convention would be seriously diminished if Article 17, and the effective denial of a Convention right, could be too easily invoked. It also stated that in maintaining plurality, which is the hallmark of a functioning democracy, the range of beliefs that must be tolerated is very broad. In order for a belief to satisfy the threshold requirements to qualify for protection, it need only be established that it does not have the effect of destroying the rights of others. The Appeal Tribunal also noted that in *Williamson* the example

given by the House of Lords of manifestations of religious beliefs that would not qualify for protection, were those which involved subjecting others to torture or inhuman punishment. It stated that this reference was consistent with the principle that only the gravest violations of Convention principles should be denied protection, as such violations seek to destroy rights.

The Appeal Tribunal found that Article 17 is the benchmark against which belief is to be assessed, and that only a belief that involves a very grave violation of the rights of others, tantamount to the destruction of those rights, would be one that is not worthy of respect in a democratic society. It noted that *Grainger* is derived from case law concerned with Convention rights and found that it was therefore correct to apply s.10 with Article 17 in mind.

The Appeal Tribunal found that at the preliminary stage of deciding whether a belief qualified for protection, the manifestation of the belief - where there is any manifestation - can be no more than a part of the analysis and should only be considered in determining whether the belief meets the threshold requirements in general. It noted that an approach that placed the focus on manifestation might lead the Tribunal to consider whether a particular expression is protected, rather than concentrating on the belief in general and assessing whether it meets the Grainger criteria. The Appeal Tribunal stated that this follows from the language of s.10, which is concerned only with whether a person has the protected characteristic by virtue of the belief in question, and not with whether a person does anything pursuant to that belief. A belief may be afforded protection while its manifestation may, depending on the circumstances, justifiably be restricted under Article 9(2) or Article 10(2) of the Convention.

The Appeal Tribunal noted that gender-critical beliefs are widely shared and are consistent with the law (*Corbett v Corbett* [1971] P83); and stated that,

> Where a belief or a major tenet of it appears to be in accordance with the law of the land, then it is all the more jarring that it should be declared as one not worthy of respect in a democratic society. [115].'

The Appeal Tribunal found that the ET had erred in its approach in assessing the Claimant's belief that biological sex is immutable. It stated that:

> The Tribunal appears here to be straying into an evaluation of the Claimant's belief. In our judgment, it is irrelevant in determining whether a belief qualifies for protection that some of its tenets are considered by the Tribunal to be unfounded, or that it might be possible for the Claimant's concerns to be allayed without adhering to or manifesting her belief. By expressing the view that it did and by proposing steps that the Claimant could take so as not to manifest her belief in a certain way, the Tribunal, was, it seems to us, implicitly making a value judgment based on its own view as to the legitimacy of the belief. In doing so, the Tribunal could be said to have failed to remain neutral and/or failed to abide by the cardinal principle that everyone is entitled to believe whatever they wish, subject only to a few modest, minimum requirements.[85]'

In relation to the ET's comments about the "absolutist'' nature of the Claimant's beliefs, the Appeal Tribunal stated that "absolutism" cannot be a valid criterion for determining whether or not a belief falls to be protected. If it were, then the more fervently a belief is held, the less likely it would be to qualify for protection. The Appeal Tribunal also noted that the ET's suggestion that the Claimant "would always, indiscriminately and gratuitously 'misgender' '' trans people was inconsistent with the ET's own findings that the Claimant would "generally seek to be polite to trans persons and would usually seek to respect their choice of pronoun but would not feel bound to do so… [89]''

In respect of the ET's view that the Claimant was not entitled in any circumstances to refer to a ''trans woman'' holding a Gender Recognition Certificate as a man, the Appeal Tribunal noted that the reference in s. 9 of the Gender Recognition Act 2004 to a person with a Gender Recognition Certificate becoming ''for all purposes'' the acquired gender means for all ''legal purposes'' [97]. It stated that:

> The effect of a GRC, whilst broad as a matter of law, does not mean that a person who, like the Claimant, continues to believe that a trans women with a GRC is still a man, is necessarily in breach of the GRA by doing so; the GRA does not compel a person to believe something that they do not… [99]'

The Appeal Tribunal went on to say that:

> Referring to a trans person by their pre-GRC gender in any of the settings in which the EqA applies could amount to harassment related to one of more protected characteristics; whether or not it does will depend, as in any claim of harassment, on a careful consideration of all relevant factors… [99].'

Analysis

This is a very significant case in upholding freedom of belief and expression, which is fundamental to the maintenance of democracy. This decision protects gender critical beliefs and lack of belief in gender identity. It also protects belief in gender identity. During the public debates about the nature of sex and gender that followed the proposals to reform the Gender Recognition Act there have been concerted attempts to try to silence the expression of gender-critical beliefs. The Appeal Tribunal in *Forstater* noted the evidence presented in the case of *R (Harry Miller) v The College of Policing and Another* ([2020] EWHC 225 (Admin)) about the hostility with which the expression of gender-critical beliefs is often met.

Miller was a judicial review in respect of the police response to the Claimant's gender-critical tweets, in which the High Court found that the police had interfered with the Claimant's right to freedom of expression under Article 10 of the Convention in a manner that was unlawful. Evidence from Professor Kathleen Stock in *Miller* described a ''hostile climate'' facing gender-critical academics within some UK universities [243]. Jodie Ginsberg, who was then the CEO of Index on Censorship, made a statement in evidence in which she said:

> Index is concerned by the apparent growing number of cases in which police are contacting people about online speech which is not illegal and sometimes asking for posts to be removed. This is creating confusion among the wider population about what is and is not legal speech, and – more significantly – further supressing debate on an issue of public interest, given that the government invited comment on this issue as part of its review of the Gender Recognition Act… Police actions against those espousing lawful, gender critical views – including the recording of such views where reported as 'hate incidents' – create a hostile environment in which gender critical views are silenced. This is at a time when the country is debating the limits and meaning of 'gender' as a legal category…It has been reported that the hostile environment in which this debate is being conducted is preventing even members of parliament from expressing their opinions openly… [249]'

In *Miller* Knowles J stated:

> I take the following points from this evidence. First, there is a vigorous ongoing debate about trans rights. Professor Stock's evidence shows that some involved in the debate are readily willing to label those with different viewpoints as 'transphobic' or as displaying 'hatred' when they are not. It is clear that there are those on one side of the debate who simply will not tolerate different views, even when they are expressed by legitimate scholars whose views are not grounded in hatred, bigotry, prejudice or hostility, but are based on legitimately different value judgements, reasoning and analysis, and form part of mainstream academic research… [250]'

Following the *Forstater* judgment, organisations which enable or fail to prevent the kind of hostile environment described in evidence in *Miller* could be open to claims of unlawful harassment or discrimination under s. 26 of the Equality Act. In *Vajnai v Hungary* ((2010) 50 EHRR 44), the European Court of Human Rights emphasised that special protection should be afforded to political speech and debate on matters of public interest. The hostile environment which has silenced gender-

critical views in recent public debates is not conducive to the development of law and policy about sex and gender which fairly balances the rights of different groups with protected characteristics. The *Forstater* judgment should help to create an environment which is more conducive to open, constructive debate, and therefore more conducive to the development of good public policy.

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Human rights – freedom of assembly – right to strike – action short of dismissal – statutory interpretation – Human Right Act 1998

Mercer v Alternative Future Group Ltd [2021] 6 WLUK 13

Employment Appeal Tribunal

The Facts

M was a workplace representative for her trade union and was involved in organising strikes. She was suspended from work and subjected to disciplinary action and before the employment tribunal she claimed that she had been subjected to a 'detriment' by being suspended, contrary to s.146 of the Trade Union and Labour Relations Consolidation Act 1992, which provides:

> A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of—
>
> (a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,
>
> (b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so,
>
> (ba) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, or
>
> (c) compelling him to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions.
>
> (2) an appropriate time" means—
>
> (a) a time outside the worker's working hours, or
>
> (b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union or (as the case may be) make use of trade union services;
>
> and for this purpose "working hours", in relation to a worker means any time when, in accordance with his contract of employment (or other contract personally to do work or perform services), he is required to be at work.

Section 152 of the Act then provides similar protection to workers who are dismissed for such reasons, but Part V of the Act deals with dismissal on grounds of taking part in a strike, making such a dismissal fair.

The employer resisted the claim on the ground that taking part in industrial action could not be an activity protected by s.146. The employment tribunal concluded that s.146 did not extend to industrial action and that UK law failed to provide effective judicial protection in respect of industrial action,

contrary to Article 11 of the European Convention on Human Rights 1950, which guarantees the right to freedom of peaceful assembly and association. The tribunal also concluded that s.146 could not be interpreted in such a way as to make it compliant with Article 11, finding that the "grain" of the legislation as a whole distinguished between protection for participation in trade union activities in Part 3 of the 1992 Act, and taking industrial action in Part 5. Accordingly, to interpret s.146 as including industrial action would undermine the legislative scheme.

The employee now submits that the tribunal had failed to exercise the duty under s.3 of the Human Rights Act 1998 to interpret s.146 in a way that was compliant with Article 11 rights. The Secretary of State, acting as intervener, submitted that the fact that protection under s.146 only applied to activities undertaken ‘‘at an appropriate time’’ meant that it could not have been intended that the protection should apply to industrial action, which would by definition not be at ‘‘an appropriate time’’.

The decision of the EAT

Allowing the appeal, the EAT stated that as a matter of ordinary language, the phrase "activities of an independent trade union" in s.146 would be apt to include industrial action. However, the Appeal Tribunal stressed that it was not the meaning of those words that led to the exclusion of industrial action from the scope of s.146. Rather, it was the effect of s.152 of the Act, which protected against dismissal on the ground of participating in the activities of a trade union, read with those provisions in Pt V of the 1992 Act dealing specifically with dismissal for participating in industrial action. Thus, if dismissal for taking part in industrial action was dealt with in Pt V, such action could not fall within the activities of a trade union under s.152 (*Drew v St Edmundsbury BC* [1980] I.C.R. 513). Accordingly, on the ordinary principles of construction, s.146 excluded industrial action (at paras 27-28, 31).

Dealing then with the Convention rights, the EAT stated that Article 11 conferred a qualified right to freedom of association and assembly, including the right to participate in trade union activity. Restrictions on the exercise of that right were permitted where they were "prescribed by law" and "necessary in a democratic society" to protect the rights and freedoms of others, and the state was under a positive obligation to secure the enjoyment of those rights (*Wilson v United Kingdom* (30668/96) [2002] I.R.L.R. 568*)*. The right to strike was protected by Article 11, and a narrower margin of appreciation applied in relation to restrictions on industrial action than was afforded to contracting states in the area of trade union rights generally, given the sensitive social and political issues involved (*National Union of Rail, Maritime and Transport Workers v United Kingdom* (31045/10) [2014] I.R.L.R. 467) (At paras 32-33, 47, 55).

The EAT then considered the compatibility of s.152 with Article 11, stressing that whether the failure of s.146 to encompass industrial action was justified under Article 11(2) ECHR was a question of proportionality. The exclusion of industrial action was not due to any legitimate aim of avoiding the imposition on employers of an obligation to pay workers who went on strike, since it was not in dispute that employers were entitled to withhold pay in such circumstances. Further, to permit disciplinary action against workers simply for exercising the right to strike would fundamentally contradict the case law of the European Court of Human Rights. No other objective for the measure had been identified as sufficiently important to justify a limitation on the ECHR right, and there was no evidence that the measure struck a fair balance between the competing interests of workers seeking to exercise their trade union rights and those of the employer and the community as a whole. It followed, therefore, that there had been a breach of Article 11 (At paras 57, 60-64, 68).

Having decided that s.152 appeared to violate Article 11, the EAT then considered whether s.146 should be read down so as to make it consistent with the Article and the case law of the European Court, above**.** The employer had argued that a compatible interpretation of s.146 was not possible because the inclusion of industrial action within its scope would introduce an inconsistency between two provisions using the same wording, thus rendering the provisions of Pt V of the Act a dead letter and going against the grain of the legislation. However, in the EAT’s view, the inconsistency that might arise between s.146 and s.152 if the former were interpreted so as to include industrial action was not reason enough

on its own to reject a conforming interpretation. The same wording could bear different interpretations depending on whether ECHR rights were engaged, and Part V would only be rendered a dead letter if, as a result of the obligation under s.3 of the Human Rights Act being applied to s.146, the same interpretation had to be applied to s.152, which was not the case.

Nor, in the EAT's view, was there anything to suggest that the "grain" of the legislation was to exclude protection against detriment for those participating in industrial action. If it had been intended to exclude any form of industrial action from s.146 protection, doing so by reference to "at an appropriate time" would create an imprecise and permeable barrier between what was and was not excluded. Industrial action could take place outside working hours. Moreover, the fact that the words "at an appropriate time" did not clearly and unambiguously exclude industrial action meant that the provision was amenable to being interpreted conformably with ECHR rights (*Ghaidan v Godin-Mendoza* [2004] UKHL 30) (At paras 22, 70-71, 75, 82-83).

Thus, in the EAT's view it was not going against the "grain" of the 1992 Act to achieve a conforming interpretation of s.146 by adding a new sub-paragraph (c) to the definition of "an appropriate time" in s.146(2), to read "a time within working hours when he is taking part in industrial action". That would not involve judicial legislation or the court making any policy choices, but would simply give effect to a clear and unambiguous obligation under Article 11 to ensure that employees were not deterred, by the imposition of detriments, from exercising their right to participate in strike action (At paras 86, 90, 93).

Analysis

The decision raises interesting questions for both constitutional and labour lawyers. Specifically it raises issues concerning the effect of European Convention law on domestic employment law and the compliance of that law with the Convention and the relevant jurisprudence of the European Court of Human Rights. With respect to the constitutional issues, the dilemma for the Appeal Tribunal in this case was how to interpret a seemingly incompatible statutory provision – one that did not appear to allow a striking worker to be protected from action short of dismissal – into one that did give such protection. This has to be done without indulging in judicial legislation or by ignoring the clear words of an Act of Parliament, or more generally the Act's purpose, or 'grain'.

Before examining how the EAT used the Human Rights Act 1998 to achieve that result, a few basic principles need to be outlined. Under s.2 of the 1998 Act the courts and tribunals must take into account the case law of the European Court when deciding cases raising Convention rights (although they do not have to follow such decisions). Then, under s.3, the court or tribunal are allowed to interpret legislation, if at all possible, in line with Convention rights and case law, and if that is not possible, under s.4 certain courts (High Court and above) are allowed to declare that legislation incompatible with the Convention right (such provisions remaining effective until they are altered by Parliament). In this case, as the EAT are not empowered to issue declarations of incompatibility, its only task was to interpret ss.146 and 152 of the 1992 Act in line with Article 11 ECHR and the relevant case law, both of which would favour the protection of striking workers from action short of dismissal. Its main obstacle, however, appeared to be the apparent purpose of the Act itself, which treated striking workers detrimentally when it came to dismissal.

Section 3 of the Act allows the courts to adopt a different interpretation to statutory provisions than applied by the courts before the Act and thus disrupts the doctrine of judicial precedent, allowing a court to disregard the previous decision of a higher court if necessary. However, under s.3 the doctrine of parliamentary sovereignty is preserved by the Act. Thus, s.3 provides that although it applies to primary legislation and subordinate legislation whenever enacted, it does not affect the validity, continuing operation or enforcement of any incompatible primary legislation, or the validity, continuing operation or enforcement of any incompatible subordinate legislation if primary legislation prevents removal of the incompatibility. Thus, if the courts, by using their interpretation powers under s.3, are unable to interpret primary legislation in conformity with Convention rights, the primary legislation continues in force and the courts have no power to strike the Act down. Accordingly, whether

parliamentary sovereignty will be truly compromised by the courts under the Act will depend on the extent to which the courts use their interpretation powers under s.3 of the Act, and how they interpret the words 'wherever possible'.

Section 3 extends the court's powers of interpretation in that the court does not have to find a true ambiguity in the statute, provided the Convention interpretation is *possible*. Evidence of the courts' willingness to abandon traditional principles of interpretation was shown in *R* v *A (Complainant's Sexual History)* ([2001] 3 All ER 1), where the House of Lords held that the interpretative obligation under s.3 applied even where there was no ambiguity, and placed on the court a duty to strive to find a possible interpretation compatible with Convention rights. Consequently, s.3 required the courts to proceed on the basis that the legislature would not, if alerted to the problem, have wished to deny the protection afforded by a Convention (in that case to a fair trial). In that case, therefore, the majority of the House of Lords allowed the insertion of words into an existing statutory provision so that it complied with a Convention right.

However, in *Re W and B* [2002] 2 WLR 720, the House of Lords sounded a clear warning against judicial legislation, stressing that the Act maintained the constitutional boundary between the interpretation of statutes and the passing and repeal of legislation. Thus, a meaning that departed substantially from a fundamental feature of an Act of parliament was likely to have crossed that boundary. As a result, courts should not allow the principles and case law of the Convention to overrule the clear words and intention of domestic legislation, and must use their powers under s.4 of the Act rather than distort the clear intention of parliament. Again, in *R (Anderson and Taylor)* v *Secretary of State for the Home Department* ([2002] 3 WLR 1800), the House of Lords warned the courts of vandalising the statutory wording, and giving the section an effect quite different from that which parliament intended. However, the distinction between interpretation and judicial law making can be difficult to maintain. For example, in *Bellinger* v *Bellinger* ([2003] 2 AC 467), the House of Lords held that it was not possible to interpret the words 'man and woman' used in s.11 of the Matrimonial Clauses Act 1971, to include a person who had undergone gender reassignment. That, in their Lordships' view, would include giving the expressions 'male' and 'female' a novel and extended meaning. In contrast, in *Mendoza* v *Ghaidan* ([2004] 2 AC 557), the House of Lords held that it was possible to interpret the legislation so as to avoid an incompatibility, and that the words 'living together as man and wife' could be construed as meaning *as if they* were living together as man and wife.

The test employed by the EAT in the present case was whether the suggested interpretation would clash with the 'grain' of the legislation; in other words its fundamental purpose. The 1992 Act clearly intended to exclude striking workers from protection from unfair dismissal (Part V of the Act), but could a court add words into the statutory provision that prohibited action short of dismissal and thereby treat strike action as an 'activity of a trade union'? Certainly, the words 'activity of a trade union' were capable of including strike action, but the main concern was that that would cause a conflict in terms of the Act's purpose – the argument being that the Act intended to exclude striking workers from the Act's protection. The EAT circumvented this by confirming that the new interpretation would not have to mean that s.152 would have to be interpreted to protect striking workers from dismissal – an interpretation that would not be possible given the Act's clear purpose with respect to *dismissal* of strikers. That left s.146 being added to in order to protect striking workers from *action short of dismissal*. That in the EAT's view was not only linguistically capable, but would produce a Convention-compliant result without damaging the clear intention of the Act to penalise strikers in the context of unfair dismissal. Further, it was justified because Parliament had not *expressly* excluded the striker from protection in s.146.

The EAT might be well be accused of judicial legislation by some, for they would argue that the clear intention of Parliament was to exclude strike action from protection in terms of dismissal *and* action short of dismissal. However, the courts and tribunals have been given an express mandate under s.3 to interpret legislation in a Convention friendly way, and in this case the EAT have achieved that by prohibiting action short of dismissal (which would be contrary to Article 11) as opposed to dismissal (which is Convention compliant). Had a declaration of compatibility been available, the EAT may have been better advised to issue such a declaration, thus leaving it to Parliament to amend, or retain the law.

As it is, the EAT have created a new interpretation in line with the intention of the 1998 Act, to ensure compatibility with Convention rights where that is possible. In this case, therefore, Parliament is at liberty to amend the law, and make it perfectly clear that strikers are unprotected from action short of dismissal. That would mean admitting that we are not willing to abide by international law and the case law of the European Court, which might indeed reflect the current attitude to European Law, and indeed to human rights in general.

With respect to employment law and employment law rights, the significance of this decision – should it ultimately be upheld – cannot be understated. English Law does not recognise a 'right to participate in industrial action' and in the early days of recognised trade union activity the House of Lords vehemently strove to ensure that industrial action was incredibly difficult to undertake (*Taff Vale Railway Co v Amalgamated Society of Railway Servants* 1901] AC 426, HL, *Quinn v Leathem* [1901] AC 495, HL). Relief from legal liability in respect of industrial action is enshrined in s.219 of the Trade Union and Labour Relations (Consolidation) Act but this is not the same as a general 'right to strike' or a right to take industrial action. For individuals dismissed as a result of taking official industrial action there is limited legal protection under s.238A of the TULRC 1992 providing the industrial action can be said to have taken place within 'protected' official action, i.e. an official strike during which the Union has complied with all the necessary procedural requirements, and then only within the basic period of 12 weeks (s.238A, 7B).

Another circumstance is if the employee is 'selectively dismissed' for taking the industrial action under s.238. In cases of 'unofficial' industrial action there are certain protections covering employees dismissed whereby the cause of such unofficial action is related to a limited class of matters including health and safety issues or protected disclosures under s.237(1A). However, under s.46(5A) TULR(C)A, a dismissal cannot amount to a detriment. There is no definition of what 'detriment' means within the section, but examples of what has been held to amount to 'detriment' in the past have included reprimands and warnings (*British Airways Engine Overhaul Ltd v* Francis 1981 ICR 278, EAT), being demoted from the employee's current job to a position of lower status (*Murphy v Blackpool Grand Theatre Trust* Ltd ET Case No.27062/81), and transferring an employee to a different job within the same organisation (*Robb v Leon Motor Services Ltd* 1978 ICR 506, EAT). Furthermore, examples of 'detriment' within the context of Trade Union activities have been held to be overtime reductions where a union representative was attending a union training course (*Edgoose v Norbert Dentressangle Ltd* ET Case No.2601906/08), and conduct that may potentially embarrass or otherwise undermine the position of a trade union representative before his members (*Lyon v Mersey Care NHS Trust* ET Case No.2408139/15). 'Detriment' can also extend to post-employment detriments, such as a refusal to provide a reference (*Woodward v Abbey National plc* [2006] EWCA Civ 822). The meaning of 'detriment', therefore, is wide-ranging and broad.

The meaning of 'industrial action' is likewise not defined by statute, Sir John Donaldson once commented that 'the forms of industrial action are limited only by the ingenuity of mankind' (*Seaboard World Airlines Inc v Transport and General Workers' Union and* others [1973] ICR 458, at 460). The most commonly known form of industrial action is, of course, strike action but there are many others – work to rule and overtime bans being among the most frequently reported examples.

In contrast to the domestic position, where no general right to strike or to take industrial action is recognised, the European Court of Human Rights has held that the right to strike under Article 11 is a 'fundamental' human right (*Enerji Yapi-Yol Sen v Turkey* (Application No.68959/01), ECtHR), and it has been further held that national law which allows detriments to be imposed for exercising such a right are a breach of Article 11 rights. This was shown in the case of *Danilenkov and others v Russia* (Application No.67336/01, ECtHR), where members of a dockers' trade union were subjected to what could under English Law be clear examples of 'detriment' following a two-week strike over pay and conditions.

Regardless of where the case of *Mercer* leads, the claimant could clearly mount a challenge against the United Kingdom at the European Court of Human Rights in respect of the effect of s.146. Both the

Employment Tribunal and the EAT were in agreement that there was an infringement of Article 11 and, based on the European case law, it is likely that the European Court of Human Rights would agree.

The ultimate impact of this particular case could be seismic. Domestically, the right to take industrial action is barely tolerated on a legislative level and such a decision may pave the way to an accepted right to take industrial action in English Law. This being said, it is likely that any such decision brought about by association with the European Convention on Human Rights and, by extension, the Court of Human Rights, would not be politically welcomed by the current administration set against the backdrop of its present weakening relationships with other European institutions. In any case, if the decision is met with tolerance, then more claims should be expected regarding the definition of 'industrial action' over the coming years, with Parliamentary intervention a possibility in the absence of any politically favourable judicial pronouncements.

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Free speech – freedom from discrimination – duty of diversity - dismissal from office

Page v Lord Chancellor [2021] EWCA Civ 254; *Page v NHS Trust Development* Authority [2021] EWCA Civ 255

Court of Appeal

The Facts and decision

In the first case - *Page v Lord Chancellor* - a lay magistrate (P) appealed against a decision of the Employment Appeal Tribunal, upholding an employment tribunal's conclusion that he had not been victimised by the respondents, the Lord Chancellor and the Lord Chief Justice. In 2014, P sat as a member of the family panel determining an unopposed adoption application by a same-sex couple. Based on his beliefs as a Christian, he expressed views to his fellow magistrates making it clear that he objected to same-sex couples adopting children; he then declined to sign the adoption order. These acts led to a disciplinary hearing and his being formally reprimanded by the Lord Chief Justice and the Lord Chancellor. Subsequently, P gave an interview on national television in which he expressed his belief that it was better for a child to be adopted by a man and a woman (in court accepted as the "broadcast words"). That led to further disciplinary proceedings and his removal from the magistracy. P complained to the employment tribunal of victimisation, alleging that the second round of disciplinary proceedings had been brought because he had done a protected act within the meaning of s.27 of the Equality Act 2010, namely complaining that the first round of proceedings was discriminatory. The employment tribunal dismissed his claim, finding that he had been removed because he had publicly stated that in adoption cases he was not prepared to put aside his own beliefs and discharge his functions as a magistrate according to the law and the evidence. The tribunal conceded that his removal interfered with his right to freedom of expression under Article 10 of the European Convention on Human Rights 1950, but then found that the interference was justified under Article 10(2) in the interests of maintaining the authority and impartiality of the judiciary. The Employment Appeal Tribunal upheld the tribunal's decision.

P appealed to the Court of Appeal on the following grounds: